LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
SEP 17 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

Nos. 6, 7 and 8.

OLETA O'CONNOR YATES, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR JACK WAYNE HALL AND JOSEPH KUZMA, ET AL., AMICI CURIAE.

THOMAS D. McBRIDE,
Attorney for Joseph Kuzma, et al.,
Land Title Building,
Philadelphia, Pa.

TELFORD TAYLOR,
Attorney for Jack Wayne Hall,
400 Madison Avenue,
New York 17, N. Y.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX.

	Page
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	2
QUESTIONS PRESENTED HEREIN	4
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. The Convictions in This and Other Recent Smith Act Trials Are Based on Unconstitutional Applications of That Act	9
A. The Evidence of the Knowledge, Intent and Actions of the Individual Defendants Is Insufficient to Support Their Convictions Under the Smith Act, Constitutionally Interpreted	9
B. The Evidence Presented in These Cases Is Insufficient to Establish That Communist Party Teachings Fall Within the Prohibition of the Smith Act, Constitutionally Interpreted	18
II. Incompetent and Irrelevant But Inflammatory or Otherwise Prejudicial Evidence Admitted Against the Defendants in This and Other Recent Smith Act Trials Deprived Them of a Fair Trial and Violated Their Constitutional Rights Under the First, Fifth and Sixth Amendments	43
CONCLUSION	52

TABLE OF CASES CITED.

Page

Communist Party v. Subversive Activities Control Board, 351 U. S. 115 7

Cruikshank v. United States, 92 U. S. 588 46

Dennis v. United States, 341 U. S. 494 ...5, 6, 8, 10, 12, 14, 18, 19, 50

Dunne v. United States, 138 F. 2d 137 (C. C. A. 8, 1943) 15

Fiswick v. United States, 329 U. S. 211 51

Frankfeld v. United States, 198 F. 2d 697, cert. denied 344 U. S. 697 .....14, 16

Fujimoto v. United States, argued July 12, 1956, and presently pending (CA 9, No. 13915) 1, 3, 8, 12, 13; 14, 51

Gitlow v. People, 268 U. S. 652, 45 S. C. 625 16

Herndon v. Lowry, 301 U. S. 242 17

Krulewich v. United States, 336 U. S. 440 51

Lightfoot v. United States, No. 52, October Term 1956 ....2, 44, 45

Mayola v. United States, 71 F. 2d 65 46

Mulcahy v. Regina, L. R. 3 H. of L. 306 46

Scales v. United States, 227 F. 2d 581 .....2, 6, 10, 44, 45, 47, 51

Schneiderman v. United States, 320 U. S. 118 .....19, 41, 43

United States v. Brandt, (N. D. Ohio, unreported) 16

United States v. Dennis, 183 F. 2d 201 .....42, 45

United States v. Flynn, 216 F. 2d 354 (C. A. 2, 1954), certiorari denied 348 U. S. 909 .....14, 17

United States v. Flynn, 130 F. Supp. 413 (S. D. N. Y. 1955) ..14, 15

United States v. Kuzma, et al., pending (CA 3, Nos. 11655-63) 2, 3, 8, 12, 50, 51

United States v. Mesarosh, 223 F. 2d 449 ...2, 6, 16, 28, 40, 44, 48, 51

United States v. Scott, 74 F. 2d 213 46

United States v. Trachtenberg (S. D. N. Y. unreported) ... 16

Wellman v. United States, 227 F. 2d 757 (C. A. 6), petition for certiorari pending, No. 9 Misc. October Term 1956 .... 2, 16

Yates v. United States, 225 F. 2d 146 .....8, 11, 12, 44

TABLE OF STATUTES AND AUTHORITIES CITED.

Page

Foster, History of the Communist Party of the United States (1952) 20

Internal Security Act, Section 4(f) (50 U. S. C. 783) 5, 10, 12; 14, 18

Lenin, Collected Works, Volume VI, p. 29 35

Lenin's Selected Works, Volume VI, page 293, under title Can the Bolsheviks Retain State Power 34

Lenin's Selected Works, Vol. VI, p. 321 37

Lenin, War and the Second International, International Publishers edition, 1932, page 13 .....33, 35

Lenin, "War and the Workers" 35

Locke, Two Treatises of Civil Government 32

"Political Affairs":

August, 1940, "The Communists and the Fatherland Front" 25

September, 1947, Editorial, p. 779 23

September, 1948, "The Fascist Danger," p. 815 24

Smith Act, 18 U. S. C. 2385 ....1, 2, 4, 5, 8, 12, 18, 27, 32, 38, 42, 43, 44, 45, 47, 49, 50, 51, 52

Socialism, the Road to Peace, Prosperity and Freedom, published in March, 1951 by William Z. Foster 23

State and Revolution, Lenin Collected Works, Vol. XXI, bk. II, p. 180 34

Stalin's Foundations of Leninism, p. 44 36

The Theory and Practice of the Communist Party, June 1947, page 25 23

Twenty-three Questions About the Communist Party Answered by William Z. Foster 22, 42

The Twilight of World Capitalism, 1949, page 26, by William Z. Foster 21

U. S. Constitution:

Article IX, Section 2 31

First Amendment 4, 51

Fifth Amendment 4, 51

Sixth Amendment 4

18 U. S. C. 2384 48

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

Nos. 6, 7 and 8.

OLETA O'CONNOR YATES, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR JACK WAYNE HALL AND JOSEPH KUZMA, ET AL., AMICI CURIAE.

INTEREST OF AMICI CURIAE.

Jack Wayne Hall, appearing as *amicus curiae* herein with the consent of both petitioners and respondent, is one of the appellants in *Fujimoto v. United States,* argued July 12, 1956, and presently pending (No. 13915) in the United States Court of Appeals for the Ninth Circuit. With six others, Hall was convicted of conspiracy to violate the advocacy and organization provisions of the Smith Act (18 U. S. C. 2385), after a jury trial in the United States District Court for the District of Hawaii.

Joseph Kuzma, Joseph Roberts, Benjamin Weiss, David Davis, Thomas Nabried, Irvin Katz, Walter Lowenfels, Sherman Marion Labovitz, and Robert Klonsky, ap-

pearing as *amici curiae* herein with the consent of both petitioners and respondent, are the appellants in *United States v. Kuzma, et al.*, pending (Nos. 11655-63) and awaiting argument in the United States Court of Appeals for the Third Circuit. These nine appellants were convicted of conspiracy to violate the advocacy and organization provisions of the Smith Act, after a jury trial in the United States District Court for the Eastern District of Pennsylvania.

The *amici curiae* have been convicted under the same statutory provisions as, and indictments comparable to, those involved in the present case. Their appeals present several issues of law and fact which are identical with or closely related to those involved in the present case, as well as in the other cases under the Smith Act that are presently pending in this Court.[1] Accordingly, the *amici curiae* have a direct and substantial interest in this Court's disposition of these issues, and join in the prayer of the petitioners in these cases that the judgments of conviction be reversed.

STATEMENT OF THE CASE.

The charges, proceedings, statutes and issues involved in the *Yates* case are set forth in the briefs filed for the petitioners. The evidence relating to each of the petitioners individually is likewise set forth in their briefs,[2] as well as

1. See also *Mesarosh v. United States*, No. 20, *Scales v. United States*, No. 29, and *Lightfoot v. United States*, No. 32, October Term 1956, as well as *Wellman v. United States*, 227 F. 2d 757 (C. A. 6), petition for certiorari pending, No. 9 Misc. October Term 1956. The *Scales* and *Lightfoot* cases involve distinct questions arising under the so-called "membership clause" of the Smith Act, but the *Mesarosh* and *Wellman* cases are in most important respects similar to the present case, and the *amici curiae* respectfully request that this brief be considered in connection with those as well as the present case.

2. See, *e.g.*, the petition for certiorari in No. 6 (then No. 308 in the October, 1955 Term) at pp. 49-72, and the brief for petitioners Al Richmond and Philip Marshall Connelly in No. 8 (October Term, 1956).

in the Government's brief in opposition to the petition for certiorari (at pp. 5-21). The comparable circumstances with respect to the *amici curiae* are summarized below.

Jack Wayne Hall. All of the defendants in the *Fujimoto* case are residents of the Territory of Hawaii. Hall is, and was throughout the period covered by the indictment, the Regional Director for the Territory of Hawaii of the International Longshoremen's & Warehousemen's Union (ILWU). The record contains evidence that Hall became a member of the Communist Party in Hawaii in 1937, that he remained a member from then until 1941 and from 1945 to 1948, and that he attended Party meetings and conventions during those years. Evidence was offered but excluded that he was not a member of the Party in February, 1950. With the other six defendants he was indicted on August 29, 1951; the trial began in November, 1952, and resulted in judgments of conviction of all the defendants in July, 1953. Appeals from the judgments have been argued and are pending in the Court of Appeals for the Ninth Circuit.

Joseph Kuzma, et al. The nine defendants in the *Kuzma* case are members and functionaries of the Communist Party, in eastern Pennsylvania. Several of them have held positions on District boards and committees, or on the staff of the Daily Worker. They were indicted on August 17, 1953, convicted in August, 1954, and their appeals are pending and awaiting argument in the Court of Appeals for the Third Circuit.

Other details of the charges and evidence against the *amici curiae* are mentioned hereinafter, where pertinent to the argument.

QUESTIONS PRESENTED HEREIN.

1. Whether the evidence of the knowledge, intent, and actions of the petitioners is sufficient to support their convictions of conspiracy under the Smith Act, constitutionally interpreted.

2. Whether the evidence is sufficient to establish that Communist Party teachings fall within the prohibition of the Smith Act, constitutionally interpreted.

3. Whether evidence admitted against the petitioners deprived them of a fair trial and violated their constitutional rights under the First, Fifth and Sixth Amendments.

SUMMARY OF ARGUMENT.

I. The Convictions in This and Other Recent Smith Act Trials Are Based on Unconstitutional Applications of That Act.

(A) The evidence of the knowledge, intent and actions of the individual petitioners is insufficient to support their convictions. In *Dennis v. United States*, 341 U. S. 494, this Court declined to review the evidence, but specified certain elements of proof—including personal knowledge, violent intent, and conspiratorial power—which are essential to the constitutional application of the Smith Act. In the present case, these elements have not been proved. The *Dennis* defendants were the principal leaders of the Communist Party at the national level. But in the present and numerous other Smith Act prosecutions the Government is seeking to sweep into the Act's ambit many Party members of minor or remote Party status and connection. With few exceptions, the lower federal courts (including the court below in the present case) have given only lip service to the constitutional requirements specified in the *Dennis* case. The convictions of the petitioners and others similarly situated are based on nothing more than evidence of Party membership and office-holding, and Party activities bearing no relation whatever to advocacy of violent overthrow of the Government. Such evidence is manifestly insufficient to support their convictions under the Smith Act as construed in the *Dennis* case, and as limited by Section 4(f) of the Internal Security Act (50 U. S. C. 783).

(B) The evidence of Communist Party teachings, as known to the petitioners, is insufficient to support their convictions. In the *Dennis* case, *supra*, the lower federal courts ruled, as a matter of law, that the defendants' conspiracy to use the Communist Party as an instrument of violent overthrow constituted a "clear and present danger" (see

183 F. 2d at 212 and 9 F. R. D. at 392), and this Court upheld the constitutionality of the Smith Act as applied to the facts found below. Although the defendants in the present and other pending Smith Act proceedings are charged with participation in the same conspiracy as was the subject of the *Dennis* trial, each case must stand upon its own record. In the present and other Smith Act cases the evidence fails to establish that the Communist Party is, or is known to the defendants as, an organization that advocates the violent overthrow of the Government "as speedily as circumstances permit." See, *e.g.*, the dissenting opinion in *United States v. Mesarosh*, 223 F. 2d 449, at 463-64. Accordingly, the convictions in the present and other such cases are unsupported by evidence of the defendants' guilty knowledge, or by proof sufficient to establish that the conspiracy as charged constitutes a "clear and present danger" to the security of the Government.

II. Incompetent and Irrelevant but Highly Prejudicial Evidence Was Admitted Against the Petitioners.

The prosecution was allowed, over objection, to present as evidence numerous third-party declarations not binding on but manifestly prejudicial to the petitioners.[3] The prosecution and the lower federal courts in recent Smith Act trials have proceeded on the theory that almost any declaration by an alleged member of the Communist Party, no matter how remote in time or place from the defendants, is admissible as evidence of its teachings. See, *e.g.*, *Scales v. United States*, 227 F. 2d 581, 589. But the Communist Party is not the conspiracy charged in these indictments, and it is only the Party's objectives *as known to the defendants* that are pertinent to the charges. To

3. See, *e.g.*, the petition for certiorari in No. 6 at p. 57, and petitioner's reply brief in support of the petition in No. 6 at pp. 22 and 30; the petition in No. 20 at pp. 31-47; the brief in No. 29 at pp. 41-43; and the brief in No. 32 at pp. 67-74.

require the petitioners to defend themselves against the out-of-court declarations of individuals unknown to them violates the guarantees of the First, Fifth and Sixth Amendments. The loose standards of admissibility that have prevailed in this and other Smith Act trials, resulting as they do in the admission of irrelevant and inflammatory testimony by "witnesses" such as the late Paul Crouch (*Cf. Communist Party v. Subversive Activities Control Board*, 351 U. S. 115), have denied petitioners and the other defendants the opportunity of a fair trial, and have worked great damage to the administration of justice in the federal courts.

ARGUMENT.

The *Yates* case and other Smith Act cases now pending in this Court present a wide variety of important constitutional and other legal issues. For example, the *Yates* case presents the question whether the trial judge's refusal to charge that the Smith Act punishes the advocacy of violent governmental overthrow only if it is by language reasonably calculated to incite such action (in accordance with Judge Medina's charge, approved by this Court in the *Dennis* case, *supra*) resulted in an erroneous and unconstitutional application of the Act. The *Yates* case likewise raises the question of the proper construction of the word "organize" in the Smith Act, in relation to the statute of limitations.[4]

In this brief *amicus*, however, we do not propose to argue all the issues, important as they may be, with which this Court is presently confronted. Rather it is our intention to deal with three basic problems, relating to the sufficiency and admissibility of evidence, which appear to be involved in all or nearly all the Smith Act proceedings that have been instituted since the *Dennis* case. For it is our belief that the Government's approach to these problems, and all too frequently the lower federal courts' disposition of them, have all but wiped out the constitutional limitations on the permissible scope of the Smith Act as stated in the *Dennis* case, and have resulted in a series of convictions that cannot be sustained or justified under the law of the land.

---

4. These two questions are also involved in the *Fujimoto* case, *supra*, in which Hall is a defendant-appellant, and the second of the two is likewise involved in the *Kuzma* case.

I. The Convictions in This and Other Recent Smith Act Trials Are Based on Unconstitutional Applications of That Act.

The first two matters for argument herein relate to the sufficiency of evidence to support convictions of Communist Party members for conspiracy to violate the Smith Act. Manifestly, there must be evidence concerning both the acts and state of mind of the individual defendants, and the teachings of the Party as known to them. For it is not the Communist Party itself that constitutes the conspiracy, nor would the activities of the handful of conspirators, standing alone, constitute a clear and present danger. In Smith Act conspiracy prosecutions there must be a *nexus* between the conspirators' violent intent, and their knowing use of the Communist Party as an instrumentality to bring about the overthrow of the Government as soon as possible.

A. The Evidence of the Knowledge, Intent and Actions of the Individual Defendants Is Insufficient to Support Their Convictions Under the Smith Act, Constitutionally Interpreted.

The general nature of the evidence presented and relied upon by the Government to establish the guilt of individual defendants in Smith Act conspiracy trials may be illustrated by a syllogism:

(1) Every defendant who is shown to be a Communist Party member is a member of a conspiracy with every other Party member named as a defendant or co-conspirator in the indictment.

(2) Some documents and declarations by Communist Party members contain passages preaching the inevitable necessity of overthrowing existing "capitalist" governments by force.

(3) *Ergo*, every Communist Party member is also a member of a conspiracy to advocate the overthrow of the Government by force and violence as soon as circumstances permit.

The foregoing is hardly an understatement of the specific gravity of the evidence against some of the defendants, and it is certainly not an overstatement of its egregious inadequacy to support the convictions. Of course, the prosecution generally seeks to fatten its proof with evidence of the Party offices held and Party activities engaged in by the defendants. But Party membership and office-holding are expressly ruled out as a basis of criminal liability by Section 4(f) of the Internal Security Act (50 U.S.C. 783). And the Party "activities" established by the evidence have generally amounted to nothing more than attendance at Party meetings and conventions, recruiting of new members, distribution of Party literature, attendance and instruction at Party schools, and other such undertakings which, misguided or not, fail to prove the essentials of criminal liability under the Smith Act. Such activities are simply the normal attributes of membership, and establish nothing more than that fact.

In the *Dennis* case, the defendants were the principal leaders of the Party at the national level, and the leading participants in the 1945 Party convention at which the conspiracy was alleged to have been hatched. The lower courts found the evidence of their individual guilt sufficient to sustain the convictions. This Court did not review the sufficiency of the evidence, but stated several elements of proof which are requisite to the constitutional application of the Smith Act. These requirements are discussed in the briefs filed in the several Smith Act cases pending in this Court,[5] and there is no need here to recapitulate them.

Since the *Dennis* case, however, these constitutional and statutory limitations on the scope of the Smith Act have been honored chiefly in the breach. The Government has cast its prosecutory net ever more widely. There have been two more trials of Party officials in New York City, and other conspiracy trials of local Party functionaries in

5. See, *e.g.*, the brief in No. 29, *Scales v. United States*, at pp. 20-22.

Baltimore, Los Angeles, Seattle, Pittsburgh, Denver, Cleveland, St. Louis, Detroit, Philadelphia, New Haven, Boston, Porto Rico, and the Hawaiian Islands. In addition, a few other Party officials have been separately indicted under the so-called "membership" clause of the Smith Act.

By this great proliferation of Smith Act prosecutions, and extension of the process into lower and local reaches of the Party, inevitably the evidentiary strands of conspiratorial connection between those newly indicted, and the *Dennis* defendants at the hub of the alleged conspiracy, have been stretched to the snapping point. The prosecution has found it difficult or impossible to produce any evidence of personal participation in or knowledge of any plans for or discussion of violent overthrow, and has relied ever more heavily on evidence of Party "activity" of no probative value in terms of guilty knowledge or intent.

The *Yates* case is a good example of this trend. Most of the petitioners have occupied only minor positions in the Party organization on the West Coast, as the petition and briefs on certiorari show.[6] A large part of the Government's evidence[7] consists of nothing more than a listing of the various Party positions held by the petitioners—the very type of evidence which Section 4(f) of the Internal Security Act specifically rules out as a basis of criminal liability. Beyond this the Government relies chiefly on evidence concerning the internal structure and disciplinary policies of the Party, and a few extracts from "classical" Communist books that were used in Party schools on the West Coast.

The lower court in the *Yates* case made no effort to apply the constitutional requirements, laid down in the

---

6. See for example, the prosecution and defense summaries of evidence relating to petitioners Dorothy Healy Connelly and Rose Kuznitz (Petition, pp. 49-50 and Brief in Opposition, pp. 11 and 13-14), and the separate brief in No. 8 for petitioners Al Richmond and Philip Marshall Connelly.

7. See the Brief in Opposition, pp. 5-14.

Dennis case, to the evidence before it. Conspiracy among the petitioners was inferred from the mere fact of Party membership. At no point did the court consider the evidence against the individual defendants; as Communists they were assumed to be fungibles. Their guilty knowledge and intent were inferred and the convictions affirmed on the grounds that "many" of the fourteen defendants "sought and obtained office as 'organizers' in the Party", and that "most" of them were in "association" both "among themselves and with other co-conspirators and with other persons whose advocacy of destruction is known". See *Yates v. United States*, 225 F. 2d 146, 163-64. Such a loose and foggy scrutiny of the record is an abdication of the appellate function, and makes a mockery of the constitutional and statutory provisions that limit the Smith Act.

The *Kuzma* case, now pending before the Court of Appeals for the Third Circuit, marks an extension of the same trend. The defendants are Party workers in eastern Pennsylvania. There is no evidence that any of them advocated or heard advocacy of the violent overthrow of the Government. The sum total of the evidence against them is that they attended meetings of the Communist Party, and that they studied its literature and encouraged others to do the same. This is the very evidence that was offered to prove their membership in the Party, and it adds nothing to the fact of membership. Under the principles stated in the *Dennis* case, and the provisions of Section 4(f) of the Internal Security Act, their convictions are insupportable.

The prosecution of the defendants in the *Fujimoto* case, and in particular the charge against Hall, mark an even further extension of the notion of "inferential guilt" under the Smith Act, which the Government is so zealously seeking to propagate. The defendants were all thousands of miles away from New York City at the time of the alleged conspiratorial Party convention of 1945. The *Dennis* defendants are named as co-conspirators in the *Fujimoto*

indictment, but there was no evidence that any of the *Fujimoto* defendants were even known to the Party leaders in New York City at that time, much less privy to their decisions and plans.

Hall himself, according to the prosecution's witnesses, was recruited into the Party in 1937, at which time he was engaged in union organizational activity in the Territory of Hawaii. He distributed Party literature and attended meetings, and became a member of the "informal executive board" in Hawaii. He briefly attended a Party school in San Francisco in 1939. When the Party was reconstituted in 1945, Hall participated in recruiting, attended territorial conventions in 1946, 1947, and 1948, and participated in the discussion of several Party policy problems. That is the sum total of the evidence on the basis of which Hall has been convicted of conspiracy to overthrow the government of the United States by force and violence as soon as circumstances permit.

The prosecution offered no evidence that Hall ever advocated or heard advocated the violent overthrow of the Government, or that he regarded the Party as an instrument for that purpose. It offered no evidence that Hall intended any such thing, and the prosecution witnesses (former Party members in Hawaii) testified that Hall and they themselves joined the Party because they thought it would be helpful in unionizing the longshoremen and plantation workers. Hall's contacts with Communists on the mainland were almost nil, and he was wholly unknown to the "leading" ex-Communist witnesses such as Crouch and Lautner. Hall was not a Party staff worker, and was actively and fully occupied throughout the period of his Party membership in union activities, especially in organizing the Hawaiian branch of the ILWU, of which he became Regional Director in 1945. With no evidence of guilty knowledge, and with the prosecution's own evidence on the issue of intent strongly tending to negate the very element on

which guilt would depend, the case should never have been allowed to go to the jury.[8]

Indeed, it is clear that the charges against many if not all of the defendants in the cases now pending before this Court and in which the *amici curiae* were convicted, would have been dismissed for lack of sufficient evidence under the principles applied by Judge Edward J. Dimock at the trial in *United States v. Flynn*, 216 F. 2d 354 (C. A. 2, 1954), certiorari denied 348 U. S. 909. Motions to dismiss the Smith Act conspiracy indictments in that case were argued before Judge Dimock in 1952, after enactment of the Internal Security Act[9] and after this Court's decision in the *Dennis* case. Moved especially by his reading of Section 4(f) of the Internal Security Act, Judge Dimock considered the evidence against each defendant with great care, and granted judgment of acquittal to two of the defendants. From his colloquy with prosecution counsel[10] it is clear enough that he was looking for evidence that would bring the defendants "in contact with the particular tenets of the Party that are treated as illegal"—to wit, violent overthrow of the Government.

In most of the instances where Judge Dimock declined to direct acquittals; it is impossible to determine what evidence appeared to him sufficient to take the case to the jury. But in the two instances—Begun and Gerson—where the cases were dismissed, there is no difficulty in ascertaining what he thought to be insufficient.

The defendant, Isidore Begun, had been both Legislative Secretary and Educational Director of District 2 (New York) of the Communist Party. He had been County Or-

8. Motions for judgment of acquittal as to all the defendants in the *Fujimoto* case were made and argued at the close of the prosecution's case, and were denied by the trial judge, apparently on the authority of *Frankfeld v. United States*, 198 F. 2d 697, *cert. denied* 344 U. S. 697.

9. The indictment in the *Flynn* case was filed in June, 1951.

10. See the transcript in *United States v. Flynn*, No. C136-7 (S. D. N. Y.) pp. 9939-86.

ganizer and Chairman in the Bronx, and was a member of the New York State Committee and Board. As a Communist, he was personally known to and by Louis Budenz and John Lautner when they were Communists. He attended the Party's National Training School in 1947, and the 1945 and 1948 New York State conventions. In 1949 he participated in a meeting in New York which considered the "underground" structure of the Party.

Simon Gerson had been a member of the Communist Party since 1935, and was on the staff of the *Daily Worker*. He was also known to and by Budenz, was Legislative Secretary of the New York Party organization, a member of the State Committee, and attended State Board and Committee meetings and the 1948 National Convention.

It is too plain for argument that the evidence against Begun and Gerson, both of whom were responsible Party functionaries working in close proximity to the Party leadership, is far stronger than the case against the petitioners or the *amici curiae*. Yet Judge Dimock granted acquittals to both Begun and Gerson, for lack of evidence sufficient to warrant a jury in finding that either of them had the knowledge and intent required for a conviction. For the same reason, Judge Dimock subsequently set aside the convictions of two more defendants—Trachtenberg and Charney—when it developed that the essential evidence with respect to their knowledge and intent was perjured testimony.[11]

In thus holding the prosecution firmly to the requisite elements of proof, Judge Dimock was following the precedent established in the very first Smith Act case,[12] in which the trial judge directed the acquittal of five of the defendant members of the Socialist Workers' Party on the ground that ". . . there is not sufficient evidence to go to the jury, and not sufficient evidence of knowledge of the

11. *United States v. Flynn*, 130 F. Supp. 413 (S. D. N. Y. 1955).

12. *Dunne v. United States*, 138 F. 2d 137 (C. C. A. 8, 1943).

Party by such defendants or that they participated in the activities to overthrow the Government by force and violence. . . ."[13] And recently, in *United States v. Brandt*, (N. D. Ohio, unreported) Judge Charles J. McNamee, on the same basis, granted judgment of acquittal to the defendant David Katz, and in *United States v. Trachtenberg* (S. D. N. Y. unreported) Judge Bicks similarly acquitted Marian Bachrach.

In these few instances, trial judges have made conscientious efforts to apply the principles of the *Dennis* case, and have endeavored to give some practical effect to Section 4(f) of the Internal Security Act. Unfortunately, such care and sense of discrimination have been the exception rather than the rule. As already noted,[14] they were lacking in the decision below in the present case, which lumped the defendants indiscriminately and upheld their convictions on the basis of nothing more than Party officership and association. The same was true in the *Mesarosh* case (No. 20), where the court flatly declared[15] that the defendants' "numerous roles as active Party leaders without more would have been sufficient to attribute to each defendant a full knowledge of the Party's purpose to bring about the forceful and violent overthrow of the government."[16]

However, as Judge Dimock pointed out, the mere showing of Party activity is not enough. The activity need not

13. The trial judge's ruling is quoted from the record in the Circuit Court of Appeals, at p. 856. The record contained evidence that the defendants as to whom judgment of acquittal was granted had attended Party meetings (see, *e.g.*, pp. 195, 209-10, 256-57, 257-59, 494, 523, 532, 542, 567, 604, 630, 642, 681-82, 687, 697, 699, 700-01, 738, and 754-57) and engaged in various Party activities. The jury acquitted five more defendants. The convictions were affirmed by the Court of Appeals under the doctrine of the *Gitlow v. People*, 268 U. S. 652, 45 S. C. 625, and therefore on the theory that the "clear and present danger" rule had no application to the case.

14. *Supra*, p. 12.

15. *United States v. Mesarosh*, 223 F. 2d 449, 451-52.

16. To the same general effect see *Wellman v. United States*, 227 F. 2d 757, 763; *Frankfeld v. United States*, 198 F. 2d 679, 686.

be intrinsically unlawful, but it must be the *sort* of activity that reasonably supports an inference of guilty knowledge and intent. As Judge Dimock put it:[17]

> "I think there must be some showing that the activities were such as to bring them [the defendants] in contact with the particular tenets of the Party that are treated as illegal in this case."

In other words, the fact that an individual attended a number of Communist meetings and conventions is very poor evidence of knowledge of the Party leaders' aims, and is no evidence at all that the individual personally intended to bring about the violent overthrow of our Government as soon as circumstances permit. To support such inferences, the "activities" must be somehow "in contact with" the Party's unlawful aims.

But one may search in vain the Government's brief in opposition to the petition for certiorari in the present case for any evidence of acts or declarations by the petitioners that bring them "in contact with" any unlawful aims. Lacking such evidence, the Government is obliged to discourse at length (at pp. 14-26) on such diverse topics as "democratic centralism", the role of Party newspapers, "concentration" in key industries, and the Party "underground". However enlightening all this information may be, it is not evidence on the crucial issues of the petitioners' personal knowledge and intent. The Government appears to lay great stress on the fact that petitioners were exposed to Party literature, including the "Marxist-Leninist classics", with their passages on the necessity of a violent revolution. Whatever the "proper" interpretation of these extracts, however, there was no evidence that the petitioners read, understood, or agreed with any of these portions. *Cf. Herndon v. Lowry*, 301 U. S. 242.

---

17. See the transcript in the *Flynn* case, *supra* note 10, at p. 9961.

The essential vice in this and other recent Smith Act prosecutions is that the Government persists, despite what Congress provided in Section 4(f) of the Internal Security Act and despite what this Court said in the *Dennis* case, in treating "active membership" in the Communist Party as tantamount to guilt under the Smith Act. The prosecution, and all too often the lower courts, have quite failed to meet the basic questions. Has the individual Smith Act conspiracy defendant, however misguided, joined the Communist Party as a vehicle for the peaceful achievement of political and economic goals, or for some other lawful purpose? Or are he and others conspiring to use the Party to overthrow the Government by force as soon as circumstances permit? Unless the latter circumstances can be proved, there may be a "clear and present danger" lurking somewhere, but it will not be criminally attributable to the defendant.

And so, if these convictions stand, the inevitable result will be greatly to expand the scope of the Smith Act; to sweep within its ambit and subject to criminal liability many other men and women who have been members of the Party, as a result of motives and conceptions which may indeed have been foolish, but which were wholly lacking in any violent or unlawful intent. Such an outcome is insupportable under the law of the land as declared by the Constitution, the Congress, and this Court, and these convictions must be set aside.

B. The Evidence Presented in These Cases Is Insufficient to Establish That Communist Party Teachings Fall Within the Prohibition of the Smith Act, Constitutionally Interpreted.

In the present argument we do not deal with any case in which there is specific evidence of teaching or advocacy of violent overthrow by individual defendants during 1949-1952. Instead, the present argument is addressed to the pending cases where the government relies upon the teach-

ing of the Communist Party of the United States during the statutory period, coupled with additional proof, whatever it may be, to bind the individual defendants to such teaching. In the cases now before the Court, and those pending in which amici curiae are interested, there is much direct documentary evidence to show precisely the position of the Communist Party of the United States during this period. That evidence shows that neither the Communist Party of the United States in its own teachings or as based upon Marxism-Leninism advocated between 1949 and 1952 the duty or necessity of overthrow of the present Government of the United States by force or violence while parliamentary and constitutional methods of change remained open.

The nature of Communist Party doctrine, as related to the issue of violent overthrow under the Smith Act, has been determined in various decisions of the lower federal courts, but not by this Court.[18] In the *Dennis* case, this Court declined to pass upon the factual issues, but took the conclusions of the Court of Appeals as assumed. Needless to say, the question whether the Party does or does not advocate violent overthrow and under what circumstances imminent or remote, must be determined on the basis of the record in each case. Whatever one's preconception about the Communist Party may be, if the Government chooses to indict the Party's members for criminal advocacy, the criminal nature of the advocacy must be proved in each case.

We do not understand that the Government makes any contention that the 1945 constitution of the Communist Party or any of its official resolutions, or other pronouncements since that date, contain any advocacy of force and violence; indeed, these means are explicitly disclaimed and

---

18. This Court did, however, analyze Communist doctrine in the *Schneiderman* case. See *infra*, pp. 41, 42.

condemned.[19] Primarily, the prosecution has relied on statements in the "classical" Communist writings of Lenin, Stalin and others, and on "expert opinion" evidence of its stable of professional witnesses such as Budenz, Crouch and Lautner. We do not believe that such "evidence" is admissible against these defendants under any known principles of evidentiary law.[20] But assuming that they may be looked to as evidence of Communist advocacy during the statutory period, they lend no support to the Government's charges.

William Z. Foster, who, in each of these cases, is named as a co-conspirator, in 1952 published his *History of the Communist Party of the United States.* Since he was the principal leader of the Communist Party, and indeed led the fight against Browder which resulted in the re-constitution of the Communist Party in July, 1945, which the prosecution makes the starting point of the conspiracy, his teaching and advocacy is important. In this book, at page 551, he says:

> "Communists are the chief fighters against the two major threats of violence in modern society—imperialist international war and fascist civil war—both of which emanate from the capitalists. The Communist Party's democratic aims are in line with the writings of Marx, Engels, Lenin, and Stalin, with the course of the every-day struggles of the workers and their allies, and with their world experience in establishing socialism. The danger of violence in the daily class struggle, and in the inevitable and indispensable advance of the workers and the nation to socialism could come only from the capitalist class, which, seeing its profits threatened, and itself being deposed from its rich dictatorship, then uses every means possible to thwart the democratic socialist will of the people. For

19. *Infra*, p. 31 n. 21.
20. *Infra*, Point II.

as the great Marx has truly said, there is no case in history where a ruling class has yielded up its domination without making a desperate struggle.

"Marxist theoreticians, while warning the workers against capitalist violence, have always pointed out possibilities for the peaceful establishment of socialism in countries where the democratic elements are strong. Thus, Karl Marx, three generations ago, before the advent of imperialism, with its highly centralized, heavily armed and bureaucratic state, said that 'If for example, the working class in England and the United States should win a majority in Parliament, in Congress, it could legally abolish those laws and institutions which obstruct its development.' Lenin also, in mid-1917, outlined a peaceful perspective for the Russion Revolution. And Stalin, writing in 1928, while pointing out the danger of capitalist violence at that time, also said that with the strong growth of world socialism, 'a peaceful path of development is quite possible for certain capitalist countries.' The C. P. U. S. A."—that is, the Communist Party, United States of America—"proceeds upon the basis that such a possibility exists in the United States."

In 1949, at page 26 of his book *The Twilight of World Capitalism*, Foster says:

"American socialism, beyond question, will have its own specific forms and methods, but basically it will be the same as socialism in other countries, with monopoly capital completely defeated, the industries and national resources in the hands of the people, production for general use instead of for profit, and the working class the leader of the whole people. Only in this way will this country and the world be finally freed of the dangers of poverty, economic chaos, fascist slavery, and murderous war. These steps could be taken

legally by a people's government, notwithstanding the opposition of the capitalists, however violent.

"To promote the election of a progressive, coalition government of this type which, by force of circumstances, would move to the Left, and eventually to socialism, on the general pattern of the European People's Democracies, is obviously not to advocate a program of force and violence, the enemies of the Communist Party to the contrary notwithstanding."

In a booklet dated January 11, 1948, there was contained a reprint of an interview printed earlier by the New York Herald Tribune about six months before any of the indictments, *Twenty-three Questions about the Communist Party Answered by William Z. Foster.* There he says:

"Q. Does the Communist Party advocate the overthrow of the United States Government by force and violence or by any other unconstitutional means?

"A. [Foster] We'll let the Supreme Court of the United States answer this question for us. In its decision in the Schneiderman case, June, 1943, after examining exhaustively, on the one hand, the charges that the Communist Party advocates a violent seizure of power, and on the other hand, the practices and doctrines of the Party, including the writings of Marx, Lenin and Stalin, the Court said:

"'A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite time in the future, because of peculiar circumstances, constitutional or peaceful channels were no longer open.'"

In a booklet entitled *Socialism, the Road to Peace, Prosperity and Freedom,* published in March, 1951, Foster says:

> "Charges that the Communists advocate violence in this transition from capitalism to socialism are not true. In order that socialism may be instituted the great masses of the American people must be convinced of the imperative necessity of this change, and undoubtedly a gigantic majority can be made to understand that they stand to gain immediately by the introduction of socialism. The masses, once having decided upon establishing socialism, will inevitably turn to the ways of peace and democracy to achieve their legitimate purpose."

In an editorial in the September, 1947 issue of Political Affairs, claimed by the prosecution and admitted by the defendants to be the official theoretical organ of the Communist Party, this statement appears (at p. 779):

> "In a word, to work for socialism is to be profoundly loyal to America. As Americans, we Communists do not want socialism to be limited to the Soviet Union. More than any other nation, America has everything necessary for a free, prosperous, socialist life for all. But as Marxist scientists, who have always fought anarchist adventurism, utopian schemes and putschism, Communists know that the socialist reorganization of society cannot take place until the American working class and its allies among the broad masses of the people desire it, and are ready to bring it about."

In another article in the same official magazine, entitled *The Theory and Practice of the Communist Party,* June, 1947, page 25, the Bill of Rights is supported. Bourgeois democracy is distinguished from and supported as against fascism, and the statement is made "The struggle for de-

mocracy is an indispensable part of the struggle for socialism." Thus the distinction between political democracy and economic capitalism is clearly drawn.

At page 815 of *Political Affairs* for September, 1948, Eugene Dennis, also named as a leading co-conspirator, published a statement entitled "The Fascist Danger", in which he says:

> "As the vanguard party of the American working class, we condemn and oppose the force and violence of capitalism, of imperialism. We oppose its system, its philosophy and its practice of political reaction, exploitation and oppression. We work for the socialist reorganization of society, when the majority of the American working class and people will be the ruling class, and end forever the exploitation of man by man, and crises, wars, reaction and fascism.
>
> "Today when the advocates and practitioners of forcible imperialist expansion and atomic war, or of lynching and police violence, maliciously charge us with conspiring to overthrow the Government, we strongly second the observations of Frederick Engels made half a century ago when Bismarck inaugurated the famous 'anti-socialist' and 'anti-revolt' laws of that time."

Then follows an inner quote from Engels:

> " 'The irony of world history turns everything upside down. We, the "revolutionaries," the "rebels"—we are thriving far better on legal methods than on illegal methods and revolt. The parties of order, as they call themselves, are perishing under the legal conditions created by themselves. They cry despairingly with Odilon Barrot: "La légalité nous tue"—legality is the death of us; while we, under this legality, get firm muscles and rosy cheeks and look like eternal life.' "

The prosecution's main witness, Lautner, has conceded, as indeed he had to, that the article entitled *The Communists and the Fatherland Front*, published in the August, 1940 issue of *Political Affairs*, states accepted Communist doctrine:

> "The Communists, leaning on the people, will build a new Socialist society, not in struggle against the peasants, craftsmen and intelligentsia, but together with them.
>
> In short, it will be the historic work of the entire people. This course of social development, comrades, may, to some, appear slower than the policy of 'take up your arms; hit right and left and set up your dictatorship.' However, the former course is not only possible and realistic, but it is also undoubtedly much less painful for the people.
>
> Hence, we Communists openly state that, in the prevailing circumstances, we chose this very course because it is a realistic and painless road to Socialism."

Perhaps even more controlling than any of the above statments is that which Foster, who was the dominant figure in the Convention of 1945, made in his report to that Convention:

> "The fourth and last false conception that I wish to speak against is the idea being circulated by 'Left' sectarian voices in our Party to the effect that the present program of the Party is only transitory, that we are on our way to a much more Left interpretation of the present national and world situation. According to these comrades, we are going to, or should denounce the war against Japan as imperialist, condemn the decisions of Teheran as unachievable, drop the slogan of national unity, call for a farmer-labor government, give up our wartime no-strike pledge,

abandon the fight for 60,000,000 jobs, bring forward the question of socialism as an immediate issue, and generally adopt a class-against-class policy.

"But these comrades are indulging in wishful thinking. Our Party, if I know it, is not going to take any such Leftist course. For the Party, in its overwhelming majority, understands that Leftist policies of this character would be no less disastrous to us than Browder's Right revisionism. The line of the National Committee's Resolution is the correct one; in its analysis, its formulation of immediate demands, and its placing of the question of socialism. We must hew to the line of that Resolution, taking into account, of course, necessary amendments. We are not getting rid of Browder's Right opportunism to fall into a swamp of 'Left' sectarianism."

The above constitutes not mere oral testimony of defense witnesses but documentary evidence which has not been contradicted anywhere. It demonstrates official Communist teaching.

In the light of these statements, two distinct questions are put. First, how can it be said that the Communist Party of the United States, during the statutory period, not only taught but advocated the "duty or necessity" of violent overthrow of the present Government of the United States? Second, how can it be said that there has been proved an intent to violently overthrow "as soon as circumstances permit"?

To these questions the Government usually makes a number of answers:

1. Some of these statements were issued after the indictment of the Communist leaders. They are "self-serving".

2. Those quotations are merely insincere public propaganda. They were made after the passage of the Smith Act.

3. Those statements contradict the basic tenets of "Marxism-Leninism" upon which, since 1945, the Communist Party of the United States has been based.

The last of these arguments is, of course, the thrust of the Government's case. But before answering that argument, we must meet the first two propositions. As to the first, it is usually pointed out by the Government that any statements made by Foster or others, after the indictment of the Communist leaders on July 20, 1948, are self-serving declarations and may be disregarded. But analysis shows that this position is not tenable. No matter whether Foster's statements vis-a-vis Foster's intent are self-serving, nevertheless on the issue of what the Communist Party taught and advocated vis-a-vis the defendants presently before the Court these statements are not subject to the objection that they are self-serving. If these defendants are bound by what Communists other than themselves say, then these statements also bind them and must be considered in their favor. Besides this, however, the Government's position as to Foster's statements subsequent to 1948 is destroyed by the fact that he said the same thing in 1947, 1945 and 1941, years before the indictment of the Communist leaders.

The Government will probably, secondly, take the position that even as to statements prior to the indictment of the Communist leaders, which are not, strictly speaking, self-serving, they are nevertheless evasive and protective in that they were made subsequent to the passage of the Smith Act in 1940. This fact is plainly immaterial. Even if Foster would prefer to advocate bloody revolution from the housetops but refrained because it would be illegal to do so, that does not alter the fact that he did refrain. If a man does not teach violent overthrow he cannot be punished as if he had done so simply because he refrained out of fear of the law. That is one of the desirable purposes the Smith Act was supposed to achieve. Constructive

treason is no longer the law of the land just as there is no such thing as constructive larceny. If a man would like to steal a watch but is discouraged from doing so because of the law there can be no criminal penalty visited upon him. In this aspect of the case it must be emphasized that we are not dealing with what the Communist Party would like to advocate but with what it did advocate within the statutory period. The indictment does not charge a conspiracy to overthrow but a conspiracy to teach and advocate. And it must be emphasized that the Government has, time and time again, affirmatively proved that the Communist Party's public advocacy is the same as its private advocacy.

And even if Foster were insincere in what he said, the Government cannot assume, while insisting that the present defendants were privy to his statements, that they were also privy to his insincerity in the absence of proof to that effect.

And finally, even if these defendants too were insincere, nevertheless, if what Foster said is what they taught and advocated and what the Communist Party taught and advocated, then their insincerity would have nothing to do with the issue of what was taught and advocated as distinguished from what they might personally intend. In this connection one of the things that Judges Hastie and Maris said in their dissent in the *Mesarosh* case, 223 F. 2d 449, at 464, is material:

> "For it is not a sufficient basis for proscription that the Communists are committed to ultimate violent revolutionary action. If their present tactic is a waiting game, characterized by the teaching of revolutionary theory while incitation to action is left for the indefinite future, the First Amendment prevents the government from proscribing their teaching. Our lawful recourse during such a period lies in the field of education and demonstration which will increase

devotion to our democratic institutions and thus frustrate Communist preachments. There is some risk in such a course. But the adoption of the First Amendment has committed us to it."

Before leaving the issue of whether the Communist Party of the United States, during the period 1949-1952, envisaged a peaceful transition to Socialism, we must consider the "Doctrine of Exceptionalism" as it bears upon that point. The prosecution takes the position that the "repeal" of that doctrine by Lenin necessarily commits the Communist Party to violent overthrow of the United States Government and negates the possibility of peaceful transition. It will be remembered that Marx had seen the possibility of a peaceful change from Capitalism to Socialism in England and the United States. Later Engels added Holland as a third country. But Lenin, in his book on Imperialism, and Stalin later in Problems of Leninism, both discarded that exception and held that although Marx was justified at the time he wrote in believing that Socialism could come peacefully in America, nevertheless times had changed and American Capitalism had grown into a Bureaucracy, the Government was Imperialistic and hence the exception was no longer valid. The prosecution has urged, therefore, that Lenin was teaching and advocating the overthrow of the United States Government as presently constituted by force and violence. But such a view is clearly incorrect. When Marx created an exception in favor of America he believed that the rules applicable to other nations would not necessarily be applicable to America. When Lenin discarded this exception it simply meant that the rules applicable to other countries would also be equally applicable to America. Therefore, the repeal of the Doctrine of Exceptionalism did not mean that the necessity of the preexisting subjective and objective conditions (hereinafter discussed) upon the concurrence of which alone a revolution would be justified was also

repealed. The change that Lenin made simply meant that at the time he wrote peaceful transition was no longer possible but that even if violence had to be undertaken it could not be commenced unless a majority of the people were in favor of it and there were no longer open any parliamentary means in the country whereby relief could be obtained.

While the prosecution welcomes and indeed insists upon this teaching of Lenin that the Doctrine of Exceptionalism is no longer valid, yet it pays no attention to the fact that Lenin has himself been modified by the leaders of the American Communist Party as shown above. The ultimate problem here is really not what Marx or Lenin taught but what the Communist Party of the United States taught and advocated within the period of the statute of limitations. To the extent that Marx or Lenin have been modified, Marxism-Leninism as applied to the Communist Party of the United States has also been modified. Nothing in any of these cases is clearer than that there is no writing of any American Communist of any importance who has within the statutory period advocated resort to force and violence.

This brings us to a consideration of the affirmative aspects of the Government's attempt to prove present advocacy of violent overthrow as soon as circumstances permit. Apparently recognizing that if the teachings of the Communist Party of the United States, during the statutory period, were to be accepted at face value, then there could be no conviction, the Government in each of these cases chooses to go back to pre-conspiracy Communist writings. It necessarily concedes that it could not even hope to sustain its prosecution without them. But it contends that it has the right to do this because the reconstitution of the Communist Party in July, 1945, the draft Resolutions of that year, and the Constitution itself show that it firmly bases itself upon Marxism-Leninism. The

Government then says that Marxism-Leninism constitutes an unequivocal teaching and advocacy of the duty and necessity of violent overthrow as soon as the circumstances permit.[21] In taking this position it seems to us that the Government has confused the teaching of a present right of revolution with a present teaching of a future right of revolution; between a right to revolt under any circumstances and a right to revolt only when peaceful parliamentary change is impossible. Here we reach the heart of the Government's case.

It is now contended that a correct analysis of the evidence produced by the Government in these cases demonstrates that although Marxism-Leninism does advocate a right of revolution, it does not advocate that such right exists irrespective of circumstances but only when the Government is either wilful or apathetic *and* parliamentary means whereby change might be accomplished are no longer available *and* there is majority support for the revolutionary step. This doctrine includes a recognition that a revolt at such time will be accompanied by violence.

It seems perfectly clear that in the United States of America, as presently constituted, the Government is not tyrannical, and peaceful constitutional change by parliamentary means is completely open. According to the testimony, there has never been a scintilla of evidence that Marxist-Leninists contend otherwise. They do say that

---

21. This despite the fact that the self-same Constitution provides in Article IX, Section 2 as follows:

> "Adherence to or participation in the activities of any clique, group, circle, faction or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy, whereby the majority of the American people can maintain their right to determine their destinies in any degree, shall be punished by immediate expulsion."

Louis Budenz, usually testifies that this was inserted as protective or "Aesopian" language which he happened accidentally to find out about by hearing two Communist leaders speak of it. How this esoteric knowledge can be imputed to present defendants escapes us.

the United States is a Bourgeois Dictatorship,[22] and that it is bureaucratic and imperialistic. But nowhere have they ever claimed that these factors warrant revolt even by a majority of the people. Their proposed substitute or the desirability of the proposed change is not involved. The sole question under the Smith Act is the method by which they hope to gain their goal.

It is suggested that the closest analogy to the Marxist view on the "right of revolution" is our own Declaration of Independence.[23] Indeed, the Declaration went further than the Marxists go. There, although our forefathers limited the right to revolt to circumstances which warranted revolution, they proceeded to to demonstrate that those conditions then existed, thus warranting immediate action. The Marxist view sets up much the same preconditions but does not say that they presently exist in the United States but only that the right of revolution will ripen if and when they come to exist.

The Declaration exactly expresses a principle central to Marxism-Leninism when it states that one of the "self-evident" truths is that "whenever any form of government becomes destructive of these ends [life, liberty, pursuit of happiness], it is the right of the people to alter or abolish it." Another passage of the Declaration is an even better expression of this principle: "But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them [the people] under absolute despotism, it is their right, it is their duty to throw off such government, and to provide new guards for their future security."

Similarly, John Locke had said in his *Two Treatises of Civil Government*:

---

22. "Dictatorship" whether applied to the Bourgeoisie or Proletariat simply means "Rule by and in the interest of".

23. It is common knowledge that Marx and Lenin borrowed freely from the architects of American political theory.

"Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty will be borne by the people without mutiny or murmur. But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they lie under, and see whither they are going, it is not to be wondered at that they should then rouse themselves, and endeavor to put the rule in such hands which may secure to them the ends for which government was at first erected. . . ."

And so Lenin, in his work entitled *War and the Second International,* International Publishers edition, 1932, page 13, says:

"For a Marxist there is no doubt that a revolution is impossible without a revolutionary situation; furthermore, we know that not every revolutionary situation leads to revolution.

"What are, generally speaking, the characteristics of a revolutionary situation? We can hardly be mistaken when we indicate the following three outstanding signs: (1) it is impossible for the ruling classes to maintain their power unchanged; for there is a crisis 'higher up,' taking one form or another; there is a crisis in the policy of the ruling class; as a result, there appears a crack through which the dissatisfaction and the revolt of the oppressed classes burst forth. If a revolution is to take place, it is usually insufficient that 'one does not wish way below,' but it is necessary that 'one is incapable up above,' to continue in the old way; (2) the wants and sufferings of the oppressed classes become more acute than usual; (3) in consequence of the above causes, there is a considerable increase in the activity of the masses who in 'peace time' allow themselves to be robbed without

> protest, but in stormy times are drawn both by the circumstances of the crisis and *by the 'higher-ups' themselves* into independent historic action.
>
> Without these objective changes, which are independent not only of the will of separate groups and parties but even of separate classes, a revolution, as a rule, is impossible. The co-existence of all these objective changes is called a revolutionary situation."

It seems perfectly clear that in no Smith Act case has there been adduced any proof that the Communist Party of the United States contends that a "revolutionary situation" presently exists in America or that they expect it will exist in the forseeable fufure.

Similarly in *Lenin's Selected Works*, Volume VI, page 293, under the title *Can the Bolsheviks Retain State Power*, the following appears:

> "If a revolutionary party has not a majority among the front ranks of the revolutionary classes and in the country generally, there can be no question of insurrection."

Also in *State and Revolution, Lenin Collected Works*, Vol. XXI, bk. II, p. 180, he says:

> "If we take for examples the revolutions of the Twentieth century, we shall, of course, have to recognize both Portuguese and Turkish revolutions as bourgeois. Neither is a people's revolution, inasmuch as the mass of the people, the enormous majority, does not make its appearance actively, independently, with its own economic and political demands in either the one or the other."

Equally fundamental is Lenin's basic limitation upon the right to use violence: "in order to obtain the power of the state the class conscious workers must win the majority to their side. As long as no violence is used

against the masses there is no other road to power. We are not Blanquists; we are not in favor of the seizure of power by a minority." *Lenin, Collected Works,* Volume VI, p. 29.

Government witnesses, such as Budenz, agree that the Communists accept the famous statement of Lenin in "War and the Workers" wherein he states:

> "We say that experience will suggest to them, and the whole people will see, that there is no other way out. We do not want to 'usurp' power for the whole experience of revolution teaches that only a power that is backed by the majority of the people can be durable. Consequently the 'usurpation' of power would be merely an adventure; and our Party would not agree to anything of the kind."

Indeed, to the objective preconditions, without which no revolution can take place, Lenin added certain subjective conditions [24]

It is certainly a fair inference that the subjective conditions of which Lenin spoke meant a strong Communist Party so that even granted the objective conditions that come about independent of the will of the people (or any class) it does not mean that a people's revolution will follow. But on the other hand it does not mean that if there

---

24. In *War and the Second International, supra,* the text goes on:

"The co-existence of all these objective changes is called a revolutionary situation. This situation existed in 1905 in Russia and in all the periods of revolution in the West, but it also existed in the seventh decade of the last century in Germany; it existed in 1859-1861 and in 1879-1880 in Russia, though there was no revolution in these latter instances. Why? Because a revolution emerges not out of every revolutionary situation, but out of such situations where, to the above mentioned objective changes, subjective ones are added, namely, the ability of the revolutionary classes to carry out revolutionary mass actions strong enough to break (or to undermine) the old government, it being the rule that never, not even in a period of crises, does a government 'fall' of itself without being 'helped to fall.'"

is a Communist Party, no matter how strong, that there can be a violent revolution without the existence of the objective preconditions.

In Stalin's *Foundations of Leninism*, p. 44, we find this idea:

> "At the same time, however, it must be borne in mind that the overthrow of the bourgeoisie can be successfully accomplished only when certain absolutely necessary conditions exist, in the absence of which there can even be no question of the proletariat taking power.
>
> Here is what Lenin says about these conditions in his pamphlet *'Left-Wing' Communism, an Infantile Disorder*:
>
> The fundamental law of revolution, which has been confirmed by all revolutions, and particularly by all three Russian revolutions in the twentieth century, consists in the following: it is not enough for revolution that the exploited and oppressed masses should understand the impossibility of living in the old way, and demand changes; for revolution it is necessary that the exploiters should not be able to live and rule in the old way. Only when the 'lower classes' do not want the old way and when the 'upper classes' cannot carry on in the old way—only then can revolution triumph. This truth may be expressed in other words: Revolution is impossible without a nation-wide crisis (affecting both the exploited and the exploiters). It follows that for revolution it is essential, first, that a majority of the workers (or at least a majority of the class conscious thinking, politically active workers) should fully understand the necessity for revolution and be ready to sacrifice their lives for it; secondly, that the ruling classes should be passing through a governmental crisis which would draw even the most backward masses into politics . . . weaken the government and make

it possible for the revolutionaries to overthrow it rapidly."

Perhaps the controlling, indeed the crucial, statement of the limitations upon permissible resort to violence is to be found in *Lenin's Selected Works*, Vol. VI, p. 321, generally acknowledged by all prosecution witnesses to constitute present Communist doctrine:

> "'Marxism is an extremely profound and many-sided doctrine. It is, therefore, not surprising that scraps of quotations from Marx—especially when the quotations are not to the point—can always be found among the "arguments" of those who are breaking with Marxism. A military conspiracy is Blanquism—'"
>
> "'—If its organizers have not reckoned with the political situation in general and the international situation in particular; if the Party in question does not enjoy the sympathy of the majority of the people as proved by definite facts; if the advanced workers are not convinced of the desperate situation of the masses and of the support of the countryside, as demonstrated by an energetic peasant movement, or by a revolt against the landlords and against the government that defends the landlords; *if the economic situation in the country offers any real hope of a favorable solution of the crisis by peaceful and parliamentary means.*'" (Emphasis supplied.)

When there is added to this analysis the fact that all American Communist writers during the period covered by the statute of limitations and for many years prior thereto have envisaged the possibility of peaceful transition to Socialism (as previously noted), it would seem plain that Marxism-Leninism as that term is used in the Constitution of the Communist Party of the United States and as applied to the present cases is not an unequivocal advocacy

of violent overthrow of the United States government while parliamentary means for change remain open. Indeed, there is no teaching or advocacy of any necessity that a revolution take place violently at all and certainly not that such a violent revolution take place as soon as circumstances permit.

Two further considerations remain:

First, the government will probably contend that some Marxist-Leninist writings indicate that the revolutionary step can be taken without a majority or that the Communists may wrongly decide at some future date that they have majority support. But, even if there are additional quotations that indicate the possibility or the desirability of taking the revolutionary step without a majority still, would it be fair to impute such a view to these defendants rather than that shown by the overwhelming evidence of the requirement that there be a majority? The defendants ought not be held vicariously liable for one or two contradictory statements where the clear import of Marxism-Leninism is that majority support is essential.

Much useless time is spent in Smith Act prosecutions on the issue of who decides whether there is a majority. On the one side it is contended that the Communist Party as the vanguard of the Proletariat arrogates to itself the right to decide that. On the other hand, it is urged that as in America and in France it will be the people themselves who decide. But since it is perfectly clear that the present teaching of Marxism-Leninism claims no right to make such decision by less than a majority and only after parliamentary means are closed and balloting is impossible, it is of no consequence that it is possible that the vanguard will deny their teaching and practice Blanquism which they profess to abjure.

But even if we were wrong in this argument and it could fairly be said that present Communist teaching is that action may be taken without majority support, nevertheless there still remains the proposition that no action is

contemplated unless and until parliamentary means are closed and hence, in the United States today, the Communist Party does not advocate action or overthrow "as soon as circumstances permit." Even if there is reason to believe that when the time comes they will be untrue to their teaching or that their teaching will change still it is their teaching and advocacy during the indictment period alone which is the governing factor in the present context. If they do change it, then the government need not any longer wait for the match to be put to the fuse or for the revolution to start. It can nip the whole thing in the bud as soon as it is made to appear that the advocacy itself has changed. But until that occurrence it is submitted that these convictions ought not to stand.

Secondly: The prosecution in these cases is able also to quote some excerpts which picture the violence which takes place once the revolution begins.

It would appear that the government in the many excerpts from Marxist writers that have been introduced in evidence has failed to distinguish between violence exerted to gain the dictatorship of the proletariat and violence thereafter exercised by the dictatorship of the proletariat; or between violence against a functioning parliamentary government and violence against governmental apparatus where no parliamentary means are open. If these distinctions are kept in mind it will be seen that the many horrendous quotations put into evidence by the government mean one thing when considered in isolation and quite another when considered in their context. The proletarian revolution is not a one step process. There are at least two phases: (1) the proletariat must gain control of the power of the state and (2) the proletariat must so use that power as to convert the society into a classless society which ultimately ends up without governmental apparatus or police power. Most of the horrendous phrases refer to the state of affairs in which the working classes, having already gained control of the government, oppress the dethroned

bourgeoisie. It is apparent that this phase must be violent because the overthrown bourgeoisie will not peacefully submit to what they regard as gross injustice. But good or bad the action of the dictatorship at such a time is at least de facto governmental action.

But all of these excerpts must be carefully read to see whether in any instance the Marxist-Leninists have abandoned the proposition that the objective conditions plus majority support which constitute the revolutionary situation are necessary. The one invincible hurdle over which the prosecution cannot get is that no Communist, from Marx to the present day, has ever advocated the right of the people unanimously or a majority or a minority to overthrow a government by violence while peaceful legislative constitutional or parliamentary means are open. Hence, the dissent of Judges Hastie and Maris in the *Mesarosh* case, 223 F. 2d 449, would seem to be correct in holding that in that case the advocacy, no matter what it was and whether dangerous or not was not "calculated to incite men to violence as soon as circumstances will permit." The dissent there said at p. 461:

> "A Marxist group may lawfully attempt to persuade people to believe unreservedly that the writings of Marx and Lenin and similar dogma constitute the only acceptable guide to struggle for a desirable kind of society. This must be coupled with some call to unlawful action against the government to make the conduct punishable. But a call to action in the indefinite future is a meaningless contradiction of terms. Some meaningful orientation in time, whether by a specification of the time when action is to be taken or otherwise, is an essential part of every call to action. Thus, the government has found it necessary here, as in the Dennis case, to charge a design to cause violent action as soon as circumstances will permit, in order to establish requisite incitation beyond indoctrination with revolutionary political theory."

The dissent then pointed out by reference to the testimony of Lautner who has become the government's chief witness in all of these cases that its proof did not justify a conclusion that Communist doctrine sought overthrow of the existing government as soon as possible.

The question of the sufficiency of the evidence on the proposition herein advanced has never been decided by this Court. The closest approach to it was in *Schneiderman v. United States*, 320 U. S. 118. There the Court considered whether the evidence was sufficient to show that Schneiderman was not attached to the principles of the Constitution at the time he was naturalized. The Court had before it for analysis the main treatises of Marxism-Leninism, viz., the State and Revolution of Lenin, The Statutes, Theses and Conditions of Admission to the Communist International, The Theory and Practice of Leninism, by Stalin, The Program of the Communist International, adopted in 1928, Why Communism by Olgin, Left Wing Communism, by Lenin, A. B. C. of Communism, by Bucharin and Preobrazhensky, Leninism, by Stalin, Lenin's Selected Works, the various Constitutions of the Communist Party of the United States, original Program and Constitution of the Workers Party of America, predecessor of the Communist Party of the United States, and various other tracts, pamphlets, magazines, etc.

After a full and comprehensive consideration of the whole body of doctrine presented to it this Court concluded:

> "A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time

> because of peculiar circumstances constitutional or peaceful channels were no longer open."[25]

Then the Court concluded that if those tenable conclusions were in fact the principles upon which the Communist Party stood they were not unlawful and one could hold them and still be attached to the Constitution of the United States.

Thus it is seen that it is lawful (a) for a de facto government to use force and violence to preserve itself; or (b) for a majority of the people to overthrow a government if and when there are no longer open legislative or parliamentary means for imperative change.

In the story of Smith Act prosecutions commencing with what is known as the first Foley Square trial, only the first of these contentions has been considered. In *United States v. Dennis*, 183 F. 2d 201, the Court said (183 F. 2d 206):

> "They [the defendants] say that the use of 'force and violence' is no part of their program, except as it may become necessary after the proletariat has succeeded in securing power by constitutional processes. Thereafter, being itself the lawful government, it will of course resist any attempt of the ousted bourgeoisie to regain its position; it will meet force with force as all governments may, and must."

---

25. The Court's statement was accepted by Foster and promulgated as Communist doctrine. In "Twenty-Three Questions", referred to above p. 22 the following appears:

> "We Communists accept this formulation as a fair statement of our attitude toward the question of political violence. American Communists have always recognized the historical fact that parties with advanced social programs cannot secure governmental power by conspiratorial methods or by minority *coups d'état*. They must have with them an overwhelming majority of the population. The danger of violence in such situations always comes from the reactionary elements, who refuse to bow to the democratic majority will."

The Court then said, however, that this was not a correct interpretation and that the defendants as shown by the record did not "mean to confine the use of 'force or violence' for the protection of the political power, once lawfully obtained." In our analysis we have agreed with this statement. But, having said this, the Court did not then proceed to consider upon what additional theory the Communists justify violence, i.e. the Court did not consider the second branch of the Marxist-Leninist concept of violent revolution as it had been recognized by this Court in the *Schneiderman* case and which is fully supported by numerous quotations stated therein and in the above argument. Up until now all courts, including this Court, have been content once they arrive at the conclusion that Marxism-Leninism advocates the duty and necessity under certain circumstances of using force and violence not to inquire further (a) as to what those circumstances are, and (b) when the force and violence may be properly used.

It is respectfully submitted that the record in the present case does not support the proposition that either the petitioners or the Communist Party of the United States, during the statutory period, advocated the necessity or duty of violent revolt. Additionally, the record supports no conclusion that petitioners had the intent to overthrow the government as soon as circumstances permit.

II. Incompetent and Irrelevant But Inflammatory or Otherwise Prejudicial Evidence Admitted Against the Defendants in This and Other Recent Smith Act Cases Deprived Them of a Fair Trial and Violated Their Constitutional Rights Under the First, Fifth and Sixth Amendments.

In Smith Act proceedings in the lower federal courts, the loose standards for scrutiny of the sufficiency of the prosecution's evidence have been matched by loose standards of its admissibility. Examples are numerous in the four cases now pending in this Court.

In the *Yates* case, much of the evidence offered to prove the Party's unlawful aims consisted of third party declarations outside of the presence and without the knowledge of any petitioner.[26] In the *Mesarosh* case, the prosecution witness John Lautner was allowed to testify to items of instruction at a Communist training school in Hungary which he (but none of the petitioners) attended in 1930, fifteen years before the inception of the conspiracy charged in the indictment.[27] In the *Scales* case, the witnesses Lautner and Clontz testified to numerous acts and declarations of third persons that did not take place in Scales' presence, and the court received lengthy and utterly irrelevant testimony about Communist views on such matters as "the Negro question" and the Korean war which, considering the time and place (Greensboro, North Carolina) of the trial, were highly inflammatory.[28] In the *Lightfoot* case, once again Lautner (as well as other witnesses) was allowed to give extensive testimony based on declarations in no way binding on the petitioner in that case.[29]

Unquestionably the most important issue raised in these cases is the admissibility of third-party declarations about the objectives advocated by the Communist Party. Under Smith Act conspiracy indictments against Communists, the prosecution must prove both that the Party was organized to advocate violent overthrow, and that the defendants knew that such was the Party's purpose. If a Party member is shown to have believed that the Party's aims are violent, but there is no proof that the Party in fact advocates violence, there is no criminal liability and no clear and present danger. If it is shown that the Party advocates violence, but there is no proof that the defendant

26. Petition for Certiorari, p. 57; Petitioner's Reply Brief, pp. 22 and 30.

27. See the Petition for Certiorari at pp. 31-35, where this and numerous other examples are drawn from Lautner's testimony.

28. See the Brief in No. 29, at pp. 41-43.

29. See the Brief in No. 32, pp. 67-74.

knew of or shared in this aim, then the essential elements of guilty knowledge and intent are lacking.

Can the prosecution prove the Party's violent aims by evidence of the statements of individual Party members, made in the absence and without the knowledge of the accused, even though the issue of guilt under the Smith Act relates only to the Party's aims *as known to the accused?* As in the four cases now before this Court, the lower federal courts have generally allowed such third-party evidence, despite the objections of the defense. The courts (and the Government here) seek to support the admissibility of such evidence on two distinct grounds.

Firstly, reliance is placed on the rule that declarations of co-conspirators are admissible against them, even though not made in each other's presence. See, *e.g., United States v. Dennis*, 183 F. 2d 201, 229. But this argument is both insufficient and fallacious for at least three reasons:

(a) Third-party evidence of the Party's aims was offered and received in the so-called "membership" cases (*Scales* and *Lightfoot*), where no conspiracy was charged and no co-conspirators were named. In these cases, it is obvious that the rule governing co-conspirators' declarations is inapplicable.

(b) In the conspiracy cases, third-party declarations about the Party's aims are offered and received even though the declarants were not named or charged as co-conspirators. Lautner, Budenz, Crouch and others who gave this type of testimony (largely recitals of their own prior teachings) were not charged or named as co-conspirators in any of these cases. Nor can the Government now contend that they were in fact co-conspirators though not named as such, for these witnesses were well known to the Government in advance of trial, and under the Sixth Amendment the defendants are entitled to be informed in the indictment of the charge of conspiracy with anyone

upon whose conduct or declarations as co-conspirator the prosecution proposes to rely. *Cf. Cruikshank v. United States*, 92 U. S. 588; *United States v. Scott*, 74 F. 2d 213.

(c) Even as to the declarations of co-conspirators, the Government's contention is unsound. For declarations of co-conspirators are not admissible against each other (if not made in each other's presence or with each other's knowledge) until the existence of the conspiracy has first been established by other evidence. "Before the declarations of co-conspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made." *Mayola v. United States*, 71 F. 2d 65, and numerous other cases cited therein in support of this well-established proposition. But in the Smith Act conspiracy cases, such declarations are offered and (erroneously) received to establish the conspiracy itself. The Government is tugging at its own boot-straps, for there is no independent evidence of the conspiracy. The mere fact of common membership in the Communist Party obviously will not suffice, for the Party is not the conspiracy charged in the indictment. Nor does evidence of Party "activities," of the type generally shown in these cases, help the Government's position, for these are simply the normal attributes of membership.[30] The prosecution must first establish, by evidence which is competent by the usual evidentiary standards, that the accused and the co-conspirators were parties to an *agreement* "to do an unlawful act, or to do a lawful act by unlawful means". See *Mulcahy v. Regina*, L. R. 3 H. of L. 306, 317. Only then are the declarations of the co-conspirators chargeable against each other.

Accordingly, the rule pertaining to co-conspirators' declarations gives no support to the admissibility of third-party declarations about Party teachings, and the Govern-

30. *Supra*, p. 10.

ment is obliged to fall back on a second line of argument. There are two distinct factual issues, we are told: whether the Party *in fact* advocates violent overthrow, and whether the defendant *knows* that fact, if fact it be. Third-party declarations, it is argued, are admissible to prove that the Party in fact advocates violent overthrow, and then other evidence directly touching the defendant may be adduced to show his knowledge of the fact. See, *e.g., Scales v. United States,* 227 F. 2d 581, 589. But this analysis, superficially plausible, does not meet the actualities of the Smith Act trials.

In many law suits, of course, it may be important to establish the existence, non-existence, or nature of a circumstance in the observable world. The location and dimensions of a building, the height and weight of a man, the effective range of a revolver, the color and maximum speed of an automobile—such matters, we may assume at least for purposes of argument, may be shown by evidence regardless of whether or not the affected litigant is privy to it, and then the litigant's knowledge of the fact, if relevant, may be shown by evidence directed to his state of mind.

What, if anything, an organization advocates is ordinarily shown by its official acts in the form of constitution, by-laws, resolutions, and other officially approved publications and declarations. If in Smith Act cases against Communist Party members, the prosecution should attempt to prove *the Party's* unlawful advocacy by reference to its official pronouncements as an organization, there certainly would be no basis for objection on the ground that the defendant was not present at the time. Of course, it would still have to be shown that the defendant knew of the pertinent pronouncements, but ordinarily this would not be difficult if the pronouncements were of such a nature that they would come to the attention of all Party members as a matter of routine.

But it is not by any such means that the Government has endeavored to prove the unlawful advocacy of the Communist Party. This is for the very simple but sufficient reason that the Party's official pronouncements do not advocate, and indeed expressly condemn the advocacy of, violent overthrow of the Government. The conspiracy charged in all these indictments is said to have been hatched at the time of the Party's reconstitution at its 1945 national convention. But the Party constitution adopted at that convention explicitly repudiates force and violence, and in 1948 it was revised to provide for the expulsion from the Party of any member "who advocates force and violence or terrorism."[31] Far from relying on the Party's official pronouncements, the Government's contention is that they are meretricious and self-serving disclaimers, and that the Party's actual purposes must be ascertained from other evidence. And this "other evidence" consists almost entirely of the very third-party declarations—whether in "classical" texts by Marx, Lenin, and Stalin (the burden of which is discussed in point I B, *supra*), or in the opinion and hearsay testimony of witnesses such as Crouch, Budenz, and Lautner—the admissibility of which is presently in question.

In approaching this question it is important to bear in mind what has already (*supra*, p. 28) been remarked: that the petitioners and other defendants in Smith Act cases are not charged with conspiring to overthrow the Government,[32] but to *advocate* the duty and necessity of its overthrow. Conceivably the leaders and many members of the Communist Party may in fact intend and attempt to bring this about. But the question is whether they propose to

---

31. See, *e.g.*, the petition for certiorari in the *Mesarosh* case at p. 21.

32. There is a federal statute prohibiting conspiracies to overthrow the Government by force (18 U. S. C. 2384), but this is not the statute under which petitioners and the *amici curiae* have been indicted.

do this (at least in part) by means of advocacy. And this is not lightly to be assumed, for it is altogether probable that governments are more often overthrown by conspiracies, juntas, or movements which do not (at least openly) advocate violent overthrow, but proclaim their desire to protect the governments against the assaults and machinations of others.

If advocacy of violent overthrow is the only "substantive evil" at which the Smith Act is directed, and if (as is clear) the Communist Party established in 1945 does not in its official pronouncements so advocate but explicitly condemns such advocacy, the prosecution's charge against the petitioners and other Communist defendants in Smith Act cases comes down to this: that despite the categorical and contrary import of the Party's official pronouncements, the petitioners and other Party co-conspirators *secretly* advocated violent overthrow among themselves and, perhaps, to others. And indeed this is precisely what the prosecution attempts to prove by means of the third-party declarations that are here under discussion.

But as soon as the issue is cast in this, its true shape, the incompetence and inadmissibility of the third-party declarations become apparent. If it is secret advocacy in contravention of open Party doctrine that is the basis of the charge, then it cannot be proved as against Party member A by what member B said to member C in A's absence. Nor can it be proved against member A by what member D wrote in a book, unless it is shown that A had read and understood the writing and knew it to embody the secret advocacy of the Party leadership. In fact, the issue is no longer "Party advocacy" in the customary organizational sense, but the secret advocacy of a conspiracy within the Party. Membership in that conspiracy can not be proved against an individual by evidence of his membership in the Party, or by hearsay evidence of what other members were saying to each other or writing in books.

The *Kuzma* case offers a prime example of the vice of admitting evidence of this type. Article IX of the Party constitution contains the provision for the expulsion of members who advocate force and violence. The witness Budenz testified that this provision was "aesopian". Asked how he knew this, Budenz testified that he learned it at a meeting attended by Eugene Dennis and John Williamson but by none of the defendants in the *Kuzma* case! Presumably if Budenz had been ill that day, he himself would not have known that this provision was "aesopian". Yet this testimony was admitted against the *Kuzma* defendants as "evidence" to prove the unlawful aims of the Party.

Comparable examples are sown throughout the records of the Smith Act cases now before the Court, and the others now on trial or appeal. There is much more at stake here than errors by the trial courts in rulings on evidence. For in fact the issues of evidentiary sufficiency (Points 1A and 1B, *supra*) and admissibility are simply different facets of the basic constitutional problem.

In this day and age, it is trite to remark that the constitutional impact of a statute is to be gauged not only by its words but by the facts to which the Government seeks to make it applicable. The *Dennis* case itself is a striking example of this Court's awareness that a statute fair in one aspect may be foul in another. And it is equally apparent that the evidentiary practices that are attached to a law may decisively affect its constitutional application.

The Smith Act, as applied in current trial practice in the federal courts, creates especially grave perils to free speech because of the apparently limitless scope of the "evidence" for which the defendants are being held answerable. The theory which now governs the trial of these cases creates an extraordinary and dangerous situation. Congress has expressly declared, in accordance with the Constitution, that it is not a crime—indeed it is simply the exercise of the constitutional rights of speech and press and assembly—to be a member of the Communist Party

and participate in its activities. But under evidentiary rulings such as we have reviewed, these rights are exercised only subject to terrible and undefined hazards. One may be convicted through the declarations of strangers, living and dead, solely because of their membership and activity in the Party. The metes and bounds of the Act, in terms of guilt or innocence, become so vague and far-reaching as plainly to trespass not only on the First Amendment, but on the due process clause of the Fifth Amendment as well. The individual defendant is deprived of any real opportunity to defend himself against the charge of sedition, and the administration of federal justice is poisoned.

Other and equally vicious consequences follow as a matter of course. The range of admissible "evidence" is stretched ever farther into the past, and defendants indicted after 1950 for a conspiracy alleged to have originated in 1945 find themselves saddled with the onus, before the jury, of what Paul Crouch has to say about his adventures in Moscow in 1928. (as in the *Kuzma* and *Fujimato* cases), or what Lautner was told in Hungary in 1930 (as in the *Mesarosh* case).[33] Irrelevant and incompetent but highly inflammatory and otherwise prejudicial evidence floods the record, and a North Carolina jury (in the *Scales* case) is regaled with testimony that the Communist Party proposes to establish a Negro nation "concentrated in Virginia, North Carolina, South Carolina, and down throughout the South."[34]

---

33. In *Krulewich v. United States*, 336 U. S. 440, it was held that co-conspirators' declarations are inadmissible unless made in furtherance of the conspiracy. Obviously, statements such as those of Crouch and Lautner, occurring as they did over 15 years before the alleged formation of the conspiracy and 10 years before the passage of the Smith Act, could not be in furtherance of its purposes. *Cf. Fiswick v. United States*, 329 U. S. 211. Even statements by the defendants themselves should not be admitted if too remote in time from the formation and operative period of the conspiracy, and the examples given in the text are nothing if not remote.

34. See the brief in the *Scales* case, at p. 42.

In the midst of the passions and dangers of these times, there is no field of federal criminal law in which the courts should be more determined to preserve to the accused his procedural and substantive rights than in these Smith Act cases. Unhappily, the trend has been toward abdication rather than fulfillment of judicial responsibility. Review and correction by this Court is urgently needed.

CONCLUSION.

The *amici curiae* respectfully join in petitioners' prayer that the judgments below be reversed.

Dated: September 11, 1956.

Respectfully submitted,

THOMAS D. MCBRIDE,
Attorney for Joseph Kuzma, et al.,
Land Title Building,
Philadelphia, Pa.

TELFORD TAYLOR,
Attorney for Jack Wayne Hall,
400 Madison Avenue,
New York 17, N. Y.